EZ Park, Inc. *and* Temesgen Dasa. Case 04–CA–092571

April 23, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On August 13, 2013, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Charging Party, Temesgen Dasa, filed exceptions. The Respondent, EZ Park, Inc., filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. April 23, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Donna Brown, Esq., for the General Counsel.
Daniel J. Sobol, Esq. and *Whitney Kummerow, Esq. (Sobol & Sobol, P.C.),* for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on July 8, 2013. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee and Section 8(a)(3) and (1) by discharging employee Temesgen Dasa for engaging in union activities. The Respondent filed an answer denying the essential allegations in the complaint. It asserts Dasa was discharged for cause—reusing parking tickets that suggested theft.

After the trial, the Acting General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record, including the testimony of the witnesses, and my observation of their demeanor, I make the following

[1] In many of his exceptions, the Charging Party attempts to introduce new evidence and arguments to support the alleged unfair labor practices. We reject these exceptions because "[a] contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived." *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In upholding the judge's credibility findings, we do not rely on the judge's statement that "Dasa knew he was doing something wrong" when he scratched off and reused a ticket.

[3] In affirming the judge's determination that Respondent did not coercively interrogate Dasa in violation of Sec. 8(a)(1), we do not rely on the judge's statement that "[former General Manager] App's conversation with Dasa in June was not coercive because, at that point, App favored bringing a union in." The Board has recognized that questioning can be coercive even though the questioner supports the employees' efforts to unionize. See *Acme Bus Corp.*, 320 NLRB 458, 458 (1995), enfd. 198 F.3d 233 (2d Cir. 1999).

In affirming the judge's determination that Respondent did not terminate Dasa for engaging in union activities in violation of Sec. 8(a)(3) and (1), we clarify that App's knowledge and Area Manager Mengesha's possible knowledge of Dasa's union activities should not be imputed to Respondent. See *Dobbs International Services*, 335 NLRB 972, 973 (2001) (finding that a supervisor's knowledge is typically imputed to the employer). Both App and Mengesha credibly denied sharing this information with Respondent, and App was a promoter of the union campaign. In these circumstances, their knowledge should not be imputed to Respondent. See *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983); *Efficient Medical Transport*, 324 NLRB 553, 553 fn. 1 (1997).

We also clarify that *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), does not require a showing of particularized animus. *Encino Hospital Medical Center-Prime*, 360 NLRB No. 52, slip op. at 2 fn. 6 (2014). Therefore, the General Counsel was not required to demonstrate animus specifically directed towards Dasa.

Member Miscimarra believes that generalized antiunion animus does not satisfy the General Counsel's initial burden under *Wright Line* absent evidence that the challenged adverse action was motivated by antiunion animus. As stated in *Wright Line* itself, the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct *was a 'motivating factor' in the employer's decision*." 251 NLRB at 1089 (emphasis added).

Finally, we do not rely on the judge's finding that "[i]t defies belief that Respondent would have waited so long to discharge Dasa if indeed it did so because of his union activities." See *United Parcel Service*, 340 NLRB 776, 777 fn. 10 (2003).

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Pennsylvania corporation with an office in Philadelphia, Pennsylvania, operates some 21 parking lots throughout the city of Philadelphia. In a representative 1-year period, Respondent purchased and received, at its Philadelphia location, goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find, as Respondent also admits, that Laborers' International Union of North America, Local 332 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Background

As indicated above, Respondent operates some 21 parking lots throughout Philadelphia. The lots are ground level lots and customers pay in advance, often in cash. Respondent employs a total of about 60 parking lot attendants. Respondent's management includes the owners, Harvey Spear and Robert Spear, as well as Robert's children, Gregg Spear, who identified himself simply as a supervisor, and Ashley Spear. From about late 2006 or early 2007 until September 12, 2012, when he was separated from his position by Respondent, David App served as general manager with responsibility over all of the parking lots and the attendants working there. Immediately beneath App in the management hierarchy were two assistant or area managers, Nathan Potts and Zawdu Mengesha.

Temesgen Dasa worked as a parking lot attendant for the Respondent from 2008 until his discharge on October 6, 2012. During the last period of his employment, he worked at the Respondent's lot on Chestnut Street Monday through Friday from 3–8 p.m., and, at Respondent's Bainbridge Street lot on Fridays and Saturdays from 3 p.m. to about 2 a.m. in the morning. He was the sole attendant at the Chestnut Street lot and he worked with Ebbsa Muktar at the Bainbridge Street lot.

Dasa's duties included acting as cashier and valet. He would utilize a three-part numbered parking ticket, the first portion of which he gives to the customer. The second part has a space for the car's control number, either the license plate number or the vehicle identification number, as well as a list of color and make of the car, which is to be circled. This part of the ticket is placed on the car's windshield, after Dasa fills it out. Dasa testified that he always entered the license plate number, but did not always identify the color and make of the car, in part because he was often too busy to enter that information. The third part of the ticket is the office copy, kept by the parking lot attendant and placed in Respondent's office.

Respondent's ticket identification process is important in assuring that payment is accounted for in all parking situations, particularly because payment is often made in cash. If tickets are not filled out correctly, the tickets can be used on different vehicles and the revenue misappropriated, a common way for attendants to steal. (Tr. 96.) App, who was called as a witness by the Acting General Counsel, testified that Respondent has had problems with theft by attendants. During his tenure as general manager, especially at the beginning of that tenure, he fired between 40 and 60 attendants for theft and related offenses. (Tr. 51, 77–79, 80.) One of the means of theft was for an attendant to take money from a customer, issue him a blank ticket, and reuse it for another customer. (Tr. 84, 99.) According to App, it was "inexcusable" for an attendant to put a blank ticket on a car, unless he was very busy. (Tr. 70.) The record includes evidence of other discharges of attendants for theft, including several for cash shortages, issuing a daily ticket to a second car, and not turning in revenue, stamping tickets out while cars were still in the lot, and switching tickets. (Exh. F to GC Exh. 5.)

The Union Campaign

The union campaign in this case began in a somewhat unusual way. General Manager App testified that he noted employee complaints about working conditions and he discussed bringing a union into the operation with Area Manager Mengesha. After talking to employees about their interest in having a union represent them, App and Mengesha decided to contact the Union. According to App, they selected four employees, none of whom was Dasa, to go with them to meet with representatives of the Union. (Tr. 55–57.) Mengesha testified that he never participated in organizing the employees. (Tr. 129.)

Among the employees with whom App spoke about a union was Dasa. App first approached Dasa on June 12, 2012, and asked if Dasa was interested in being represented by a union. Dasa replied that he was, and, a couple of weeks later, Dasa was contacted by a representative of the Union, whom he could not name or identify. Dasa was working alone at Chestnut Street when he spoke with the union representative. At that time, Dasa signed a union authorization card and obtained several blank cards to distribute to other employees. Over the next few weeks, Dasa obtained signed cards from seven other employees, including Muktar, who worked with Dasa at Bainbridge Street. Dasa returned the other signed cards to the union representative and never had any further contact with him. (Tr. 19.)

On August 6, 2012, the Union filed an election petition in a unit of Respondent's full- and part-time parking attendants. A stipulated election was held on September 12, 2012, which the Union lost by a vote of 48 to 11. It does not appear that objections to the election were filed.

Respondent vigorously contested the election, hiring an outside consultant and labor counsel to aid in the campaign. App testified that the Spears solicited and even paid some employees to campaign against the Union. Among the employees who campaigned against the Union was Maktar, who had earlier signed an authorization card given to him by Dasa. App also offered uncontradicted testimony that he was separated from

his employment after he refused to provide the names of union supporters to the Spears.[1]

The Alleged Interrogation of Dasa

Dasa testified that, on October 3, 2012, some 3 weeks after the election, he was approached by Area Manager Mengesha at the Chestnut Street lot. According to Dasa, after some general conversation about how business was going, Mengesha asked him about the Union—"how many people signed and how I got them to sign." Mengesha then asked Dasa for "their names and I refused to give them." According to Dasa, after that, Mengesha left. (Tr. 20–21.)

Mengesha denied that he had any such conversation with Dasa. He testified that his shift overlapped with Dasa on October 3 for only about 1 hour and he never spoke to Dasa at all on that day. (Tr. 128–129.)

Neither Dasa nor Mengesha was cross-examined about his testimony concerning the alleged October 3 conversation. Such a bare one-on-one conflict presents a difficult credibility determination for a trier of fact. But the Acting General Counsel has the burden of proving the allegation of coercive interrogation. That includes proof of the credibility of the witness whose account supports the allegation. As between Mengesha and Dasa, I find that Mengesha was the more reliable witness. Dasa's testimony was incomplete because he did not testify what his answers were to the first two questions allegedly posed by Mengesha. Moreover, there is no proper context supplied for why Mengesha would ask Dasa any union-related questions, particularly well after the election, which the Union lost by a wide margin. Neither Mengesha nor any other supervisor had expressed an interest in Dasa's union activities even before the election, when that interest would have been more pertinent. App's conversation with Dasa in June was not coercive because, at that point, App favored bringing a union in; it was simply an effort to see whether Dasa was interested in having a union. Nor were there any other allegations of unlawful threats or interrogations during the union campaign. In addition, as noted below (fn. 3), I found one aspect of Dasa's testimony about the circumstances of his discharge not entirely credible. Thus, I find Mengesha's denial more convincing than Dasa's testimony about the October 3 conversation. Accordingly, I shall dismiss the allegation that Respondent violated the Act by coercively interrogating Dasa.

The Discharge of Dasa

On October 6, 2012, when Dasa reported for work at Bainbridge, both Muktar and a new employee, David Mikonnen, who had just started working the week before, were also on duty. Supervisor Mengesha testified that, on that day, he stopped by the Bainbridge lot and was asked by Muktar to be removed from that location. According to Mengesha, Muktar said that there was "funny business going on . . . during the night time and I don't want to work with it." (Tr. 129.) On cross-examination, Mengesha testified that "funny business" is a term he understood—and is understood in the industry—to suggest theft. He also testified that Respondent always treats theft as a dischargeable offense. (Tr. 131.) As a result, Mengesha notified his superior, Gregg Spear, of Muktar's report; and he transferred Muktar to another parking lot, leaving only Dasa and Mekonnen at the Bainbridge lot. Since Dasa was the more experienced of the two, he handled the cashier and ticketing function the rest of the shift.[2]

Thus alerted, Spear went to the Bainbridge Street lot with another supervisor, arriving at about midnight, with the purpose of making a parking lot inspection. Such inspections are not unusual and involve checking whether the parking tickets match the cars on whose windshields they appear. (Tr. 99–100.) Dasa admitted that mismatched tickets are problems and could result in discipline. (Tr. 42.) He also admitted that he had been told in the past that he should not be putting mismatched tickets on cars. (Tr. 44.) In this connection, before Spear started the inspection, Dasa volunteered to Spear, according to Dasa's own testimony, that, earlier that night, he had scratched off information on a completed ticket and put the ticket on another car. According to Dasa, he had done this because the customer changed his mind after paying him and after Dasa had filled out the ticket. Dasa then gave the customer his money back and reused the scratched out ticket on another car. (Tr. 23.)[3]

During his inspection, Spear found that, in several instances, the license numbers on the tickets on car windshields did not match the license plates on the cars, thus indicating that the tickets may have been reused and that the attendant had pocketed the money from the first use of the ticket. The record shows that five such tickets were found during the lot inspection. (Exh. C to GC Exh. 5.) None had the color and make of the car on them, and four had a mismatched license plate number; one had no indentifying information on it at all, not even a license plate number. Dasa admitted that his handwriting is on all except the blank ticket. (Tr. 30.) There is no evidence that Mekonnen was responsible for the blank ticket. Dasa testified that Mekonnen did very little that night. (Tr. 22–23.) And Spear testified that he spoke with Mekonnen and was satisfied that he had nothing to do with the improper ticketing. Mekonnen was being trained by Dasa and was not handling

[1] None of the incidents related by App in his testimony set forth above were alleged as unfair labor practices.

[2] Mengesha's testimony about Muktar's report to him is uncontradicted.

[3] I found Dasa's testimony on this point revealing and his explanation unconvincing. It was an attempt to give an innocuous explanation for what turned out to be the offense for which Dasa was fired. The testimony not only bears unfavorably on Dasa's credibility as a witness, but it supports the notion that Dasa knew he was doing something wrong and Spear would uncover damaging evidence in his lot inspection. There is no need to scratch out information on a ticket and reuse it since there are large quantities of blank tickets available for use by attendants. Moreover, Dasa's testimony is internally inconsistent. He claimed that he did not have time to complete the information on the tickets because he was busy. Yet, according to Dasa, he had the time to fill out a ticket and take a customer's money and also to scratch out the information and return the customer's money. I find the latter account implausible.

revenue or ticketing on the night in question. (Tr. 107–108, 110, 115–116.)[4]

After finding what he considered improper tickets and suspecting theft of money from customers that had not been accounted for in the documentary record, Spear asked Dasa for an explanation. Dasa did not respond. (Tr. 101, 11, 119–120.) Dasa testified he did not want to argue with Spear. (Tr. 43.) But I find it significant that Dasa did not offer an explanation for the improper tickets at the time, especially after he had earlier volunteered to Spear that he scratched off a ticket and reused it. Spear then asked Dasa to leave the premises. Dasa was later discharged. The termination notice states that Dasa's last day was October 6, 2012, and that he was terminated for "willful misconduct, reused tickets found on other cars." Dasa refused to sign the termination notice. (Exh. D to GC Exh. 5.)

According to App and Spear, Dasa was a good employee, who was trusted enough to work at a relatively busy parking lot and to train a new employee. But App testified that Dasa would not always fill out his tickets and would sometimes put blank tickets on cars. App also testified that Dasa, like other attendants, did not always indicate the color and make of a car on his parking ticket; and he was cautioned about that. App further testified, as did Spear, that that information is not as important as placing the correct license number on the ticket. (Tr. 73–74, 98.)

B. Discussion and Analysis

Motive-based allegations of discrimination are decided under the framework of the Board's *Wright Line* decision.[5] Under *Wright Line*, the General Counsel must make out an initial showing that the employee's protected or union activity was a motivating factor in the adverse employment action. That burden may be satisfied by showing that the employee engaged in union activity, and that the employer knew about those activities and bore animus toward the employee's union activities. Other factors supporting an initial showing of discrimination are the timing of the adverse action and proof that the proffered reason for the adverse action was a pretext. *Vision of Elk River, Inc*., 359 NLRB No. 5, slip op. 3–4 (2012), and cases there cited. Once the General Counsel makes an initial showing of discrimination, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct." *Bally's Atlantic City,* 355 NLRB 1319, 1321 (2010).

Applying the above principles, I find that the Acting General Counsel has not shown that Dasa's union activities were a motivating factor in his discharge. I also find that, even if that showing had been made as an initial matter, the Respondent has shown that it would have discharged Dasa for valid reasons unrelated to his union activities.

Respondent undoubtedly harbored animus against the Union, as shown by the testimony of App, whom it dismissed after he refused to provide the names of union supporters. But there is no evidence that such animus was directed towards Dasa for his union activities. Indeed, there is no specific evidence that the Spears knew whether Dasa even supported the Union. App refused to give the Spears Dasa's name or the names of any of the union supporters when asked. Dasa did, of course, sign an authorization card and distributed several others to fellow employees and turned them in to a representative of the Union. But he was not otherwise a particularly active union supporter. He was, for example, not among the four employees who first were brought to the Union to initiate the union organizing campaign. And Dasa could not even name the representative of the Union in charge of the organizing campaign, with whom he met on only two occasions. Nor is there any evidence that Respondent's union animus lingered after the election. There were no other contemporaneous unfair labor practices committed by Respondent; indeed, none at all either before or after the election. Finally, the timing of Dasa's discharge was well removed from the union campaign. He was discharged almost a month after the election, which had resulted in a resounding loss for the Union. It defies belief that Respondent would have waited so long to discharge Dasa if indeed it did so because of his union activities. Thus, I cannot make the inference that his discharge was motivated by discriminatory reasons.

Nor do I buy the Acting General Counsel's attempt to show that Dasa's termination for improper ticketing was a pretext. Dasa was indeed responsible for improper ticketing on the night of October 6. Even before the lot inspection, Dasa admitted to Spear that he had reused a ticket after scratching out previously written information on it. His testimonial explanation for that was unconvincing. Dasa was also responsible for four mismatched tickets and one blank ticket uncovered during the lot inspection. He could offer no legitimate explanation for the improper ticketing when confronted by Spear after the lot inspection. Moreover, there is no evidence that the report of impropriety that caused the lot inspection was not legitimate.[6]

In these circumstances, it would have been irresponsible for Respondent not to check out the accuracy of the report. There is no doubt that the improper ticketing suggested theft and there is likewise no doubt that Respondent viewed such conduct seriously and discharged other attendants for such improprieties. Contrary to the contention of the Acting General Counsel (Br. at 33), there is no evidence of disparate treatment; indeed, the evidence is that Respondent routinely fired attendants for improper ticketing that amounted to suspicion of, or actual, theft. Accordingly, I find that the reason offered by Respondent for the discharge was not a pretext. The improprieties really happened and they were not a cover up to mask a discriminatory reason for the discharge.[7]

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[4] Spear's testimony as set forth above was uncontradicted and was supported in part by the supervisor who accompanied him and helped with the lot inspection.

[5] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] Contrary to the Acting General Counsel's contention (Br. at 25), no adverse inference may be charged against Respondent for the failure to call Muktar as a witness. As an employee and not a supervisor or agent of Respondent, Muktar was equally available to either side. Neither side chose to call him. Indeed, the prosecution had more reason to call Muktar because, without his testimony, Mengesha's testimony about his conversation with Muktar was uncontradicted.

[7] In her brief (Br. at 15, 28–29, 32), counsel for the Acting General Counsel alleges that Respondent's position statement offered other

For the reasons stated above, I find that, even if the Acting General Counsel had satisfied the initial burden of showing discrimination in this case, the Respondent has shown that it would have fired Dasa for reasons unrelated to union activities. Accordingly, I will dismiss the complaint allegation that Respondent violated Section 8(a)(3) and (1) of the Act.

reasons for the discharge—including that Dasa's settlement sheets showed cash discrepancies. Thus, according to the Acting General Counsel, Respondent offered shifting reasons for the discharge, a factor supporting a finding of pretext. I reject that contention. Spear's testimony and the termination notice make clear that the mismatched and blank tickets discovered during the lot inspection were the reasons for the discharge; in neither Spear's testimony nor the termination notice was there mention of settlement sheet disparities. Nor does Dasa's failure to note the color and make of the cars on his tickets amount to shifting reasons. Indeed, Spear candidly testified that Dasa's omission in that respect did not enter into his decision to discharge Dasa. (Tr. 109–110.)

CONCLUSION OF LAW

The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. August 13, 2013

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.